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No. 967

In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN SING and FRIEDA SING,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN SING and FRIEDA SING,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, John Sing and Frieda Sing, natural born citizens of the United States, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled cause on the 14th day of November, 1962, and the Order denying the re-hearing entered on the 7th day of January, 1963.

CITATION TO OPINION BELOW

The Supreme Court of Florida denied Petition for Writ of Habeas Corpus, Case No. 32,031, on November 14, 1962, (Appendix 1-A, and Transcript of Proceedings, Volume III,

page 13-15), and Petition for Re-hearing, (Appendix 2-A, and Transcript of Proceedings, Volume III, p. 18). Neither opinion or Order have been officially reported.

JURISDICTION

The Order of the Supreme Court of Florida was dated and entered on November 14, 1962, (Appendix 1-A and Transcript of Proceedings, Volume III, p. 13-15), A Petition for Re-hearing was filed November 27, 1962, (Appendix 3-A, Transcript of Proceedings, Volume III, p. 16-17), and Order denying same dated January 7, 1963, (Appendix 2-A, Transcript of Proceedings, Volume III, p. 18).

This Petition is filed within 90 days from January 7, 1963, and Petitioners contend the State of Florida denied to them their rights as guaranteed and as provided and set forth under the Fourth and Fifth Amendments, and Section 1 of the Fourteenth Amendment of the United States Constitution.

QUESTION PRESENTED FOR REVIEW

Whether under the facts and circumstances of this case the Petitioners have been deprived of their rights as guaranteed under the Fourth Amendment by which unreasonable searches and seizures are prohibited, whether the ban against self-incrimination has been violated under the Fifth Amendment and whether or not the due process clause of the Fourteenth Amendment has been violated by the State Courts.

STATEMENT OF THE CASE

The Petitioners have previously filed their Petition for Writ of Certiorari in the Supreme Court of the United States, cited as *John Sing, et al, Petitioners, v. Florida, Case No. 965, decided June 19, 1961, 366 U. S. 964, 6 L. Ed 2d 1255, 81 S. Ct. 1924.*

The Petitioners, John Sing and Frieda Sing, were co-defendants with Richard J. Langston in the Circuit Court of St. Johns County, Florida.

The Defendant, Richard J. Langston, was charged as a principal to the offense of an unlawful abortion in which Petitioners were charged as accessories. Langston was acquitted, Petitioners were convicted and upon appeal to the District Court these were affirmed, except as to the imposed indeterminate sentence from six months to a maximum of seven years, and upon reversal, as set forth in the case of *John Sing and Frieda Sing vs. State, (Fla., 115 So. 2d 73), District Court of Appeal, First District*, it was directed said Defendants be re-sentenced. Accordingly, on August 1, 1960, Presiding Judge P. B. Revels sentenced each Petitioner to serve the maximum sentence of seven (7) years. The judgment of conviction as to both Petitioners did not become final until after June 19, 1961, the date of the rendition of the case of *Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed 2d 1081.* The Defendants were confined pursuant to said final judgment subsequent to June 19, 1961, and prior to September 7, 1962.

That at the trial of the cause whereat the judgment was entered against the Petitioners, there was introduced into evidence, and in violation of the Due Process Clause of the

Fourteenth Amendment and the Fourth and Fifth Amendments to the Constitution of the United States of America, certain evidence which was obtained by virtue of an unlawful search and seizure. That the admission of the said evidence as aforesaid vitiates the convic ions of the Petitioners, and each of them. That the question of unlawful search and seizure here involved has never been considered by any court of Florida in light of the Due Process Clause of the Fourteenth Amendment and the Fourth and Fifth Amendments to the Constitution of the United States, except the Supreme Court of Florida.

The illegally obtained evidence which was admitted over timely objection consisted of photographs, physical evidence and testimony as follows:

(1) A photograph, (State Exhibit # 1), (T. 270-272), subsequently connected with a search of a mail box located at 5650 Beach Boulevard in Duval County from which mail was taken, (T. 389), without authority from the owners thereof, to-wit, the Petitioners, and upon which the name of the Petitioner, John Sing, appeared, (T. 389-390), and consent to the search and procurement of the name thereon not having been given and which said information was received in evidence.

(2) State Exhibit # 10, a paper, was removed from a garbage disposal constainer at 5650 Beach Boulevard, the container being then located on a lot back of this address; the same was contained in State Exhibit # 11, (T. 380-384), and upon which appeared the name of Mary Abbott, a state witness, (T. 384). The testimony (T-395), reflects 5650 Beach Boulevard was the place where witness Abbott dealt with Frieda Sing, (T. 397). The testimony was the first connection between the alleged abortions and Petitioner, John Sing.

(3) On the evening of May 18, 1956, St. Johns County Deputy Sheriff, Cecil Wilds, went to a certain place in St. Johns County, Florida, called the "Hunta Hunta Hara Lodge", (T. 289), to execute warrants for the arrest of the Petitioners. Before the warrants were executed a Dr. Langston (later a co-defendant), was taken into custody as he left the premises, (R. 310), though there was no warrant for his arrest, (R. 333).

Deputy Wilds testified that he executed the warrants on the Petitioners *outside the Lodge* at the back door, (R. 311):

"Q. Did anyone else come out?

A. John Sing and Frieda Sing, one of them, out of the back door.

Q. John Sing or Frieda Sing?

A. Yes, sir.

Q. Which one was it?

A. I believe it was Mr. Sing.

Q. John Sing?

A. Yes, sir; John Sing. And then Mrs. Sing came out and I advised them that I had a warrant for their arrest".

Nothwithstanding that the warrant was executed outside the Lodge, Mr. Wilds forced the Petitioners to go back into the Lodge, it being a constitutionally protected area, where items

of physical evidence were seized, and photographs later used in evidence were made, (R. 313):

> "Q. After you took them into custody you entered Hunta Hunta Hara Lodge with them?
>
> A. Yes, sir. I took everyone back inside."

The excerpts of testimony quoted above were adduced by the State's own witnesses in response to questions by Mr. Judge, the State's attorney. It is therefore manifest that the warrants for arrest (*not* search warrants) were executed outside the Lodge. Accordingly, the Deputy Sheriff had no right under the law to enter the Lodge and conduct a search or seize evidence.

(4) That subsequent to the arrest of Petitioners and after their departure, officers, without authority, on May 19, 1956, searched Hunta Hunta Lodge, (T. 453), and removed there from physical objects that were used in evidence against Petitioners, (Exhibit 15).

(5) As a result of these illegal searches and seizures numerous damaging exhibits were obtained and received in evidence, to-wit:

1. State Exhibit # 1, a photograph
2. State Exhibit # 2, Affidavit of arrest
3. State Exhibit # 3, Warrant of arrest
4. State Exhibit # 4, a photograph
5. State Exhibit # 5, a photograph

6. State Exhibit # 7, a photograph

7. State Exhibit # 10, a paper

8. State Exhibit # 11, an envelope

9. State Exhibit # 15, numerous physical objects.

(The references to the pages wherein the letter T is used refers to the numbers in the center of the page of the Trial Proceedings).

(The numbers lettered in red ink were placed thereon by the Clerk of the Florida Supreme Court).

Oral objections were made to the introduction in evidence of State Exhibit # 1, a photograph, of the home of the Petitioners, (T. 270-272), that was subsequently connected with a search of their mail box at 5650 New Beach Boulevard and a piece of paper marked State Exhibit # 10 that was removed from a garbage disposal container at the above address, (T-383).

The Defendants were arrested May 18, 1956, (T. 289), (Exhibit # 3), and carried into the nearby building that was searched. Objections were made, (T. 290), (T. 311-312), and objection was made to State Exhibit No. 4 and No. 5, (T. 319-320), and by reference it is revealed, (T. 320), the legality of the search had been raised by Motion to Suppress. The Court overruled all objections.

On May 19, 1956, the day following the arrest of the Petitioners and after the departure of the officers, and Petitioners on May 18, 1956, the officers removed physical objects, (Exhibit # 15), (T. 453), The same is true of Exhibits No. 17 and 18, Objections, (T. 455).

Evidence concerning keys and a key were received into evidence, (T. 328-339), over objection of counsel.

The officers entered the premises, (T. 347), and peeped through blinds and entered the building. Objection was duly made, (T. 353), about what was seen in the building because such was the result of an unlawful search, (T. 354), and the same were overruled.

The matter of the unlawful search and seizure was raised in the First District Court of Appeals of Florida but was not presented to the Supreme Court of Florida until the Petition for Writ of Habeas Corpus was filed, (Volume III, p. 1-11), in which the urged questions were fully raised. The Supreme Court of Florida denied said Petition, (Appendix 1-A).

REASONS FOR GRANTING WRIT

The Petitioners contend the State intoduced evidence at the trial which occurred between February 27, 1957, and March 1, 1957, that was the product of an illegal search and tnat the doctrine of *Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L Ed 2d 1081, rendered June 19, 1961*, has a retroactive effect and by virtue thereof the Petitioners have been denied the protection afforded by the Fourth and Fifth Amendments of the United States Constitution. The Judgment of conviction had not become final on June 19, 1961, because on this date the Supreme Court of the United States was then exercising jurisdiction over these Petitioners.

The Supreme Court of Florida, in its opinion denying habeas corpus, Volume III, Transcript of Proceedings, p. 14, inter alia, said:

> "The basic weakness in the position of the Petitioners, however, is the fact that the decision in Mapp v. Ohio, supra, added nothing whatever to the laws of Florida",

and (p. 15) to the effect the right now claimed has in effect been waived.

In the instant case the State of Florida failed to make any reply to the Petition for habeas corpus. The allegation and fact the Petitioners are illegally detained in prison by reason of the use of evidence that was obtained in violation of the due process clause of the Fourteenth Amendment and the Fourth and Fifth Amendments of the United States Constitution is not denied.

Petitioners urge the case of *Leonard Hall, Jr., Appellant, vs. Warden, Maryland Penitentiary, Appellee, # 8592, United States Court of Appeals for the Fourth Circuit, decided January 17, 1963*, is ample authority to grant the relief sought herein. In this case no objection was made to the use in evidence of illegally obtained evidence. In the instant case, as in the Hall case, no reason existed why the officers could not have obtained a search warrant and thusly remanded the Hall case with instructions to afford Hall such relief as in its discretion "is consistent with harmonious state-federal relations".

CONCLUSION

For the reasons stated the Petition for Certiorari should be granted and ultimately an Order entered directing that the Supreme Court of Florida enter an Order that an appropriate hearing be held to determine whether or not that the evidence that it is claimed was illegally admitted was done so in violation of state-federal relations and thereby determine if any of the Petitioners' constitutional rights or guarantees have been violated.

Respectfully submitted,

A. K. BLACK
P. O. Box 527
Lake City, Florida

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that six (6) copies hereof have been furnished to Honorable Richard W. Ervin, Attorney General, Tallahassee, Florida, by mail, this 24th day of April, 1963.

A. K. BLACK
Attorney for Petitioners

APPENDIX 1-A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1962

JOHN SING, and FRIEDA SING,

Petitioners,

vs. CASE NO. 32,031

LOUIE L. WAINWRIGHT, as Director, Division of Corrections, State of Florida,

Respondent.

Opinion filed November 14, 1962

Case of original jurisdiction – Habeas Corpus

Larkin, Lewis & Decker, M. H. Myerson and A. K. Black, for Petitioners

Richard W. Ervin, Attorney General, and James C. Mahorner, Assistant Attorney General, for Respondent

THORNAL, J.

John and Frieda Sing, by their petition for a writ of habeas corpus, seek release from the state prison.

The sole question for determination is whether their conviction and subsequent imprisonment were accomplished by a denial of organic due process.

On March 1, 1957, the petitioners were found guilty of committing a non-capital felony. A judgment of conviction and a prison sentence followed. They appealed to the District Court of Appeal, First District. The conviction was affirmed but a correction of the sentence was directed. Sing v. State, Fla. App., 1959, 115 So. 2d 773. This Court was not requested to review the decision of the Court of Appeal. On October 13, 1960, the petitioners requested leave of the Court of Appeal to file a petition for a writ of error coram nobis. The petition was grounded on the alleged bias of the trial judge. It was denied by the Court of Appeal. Review of that order was sought by appeal to this Court. We dismissed the appeal by order dated March 1, 1961. The Supreme Court of the United States subsequently denied certiorari without opinion. Sing v. State of Florida, 366 U. S. 964, 6 L. 2d 1255, 81 S. Ct. 1924.

The instant petition for habeas corpus tenders the contention that at the original trial certain exhibits were allowed in evidence which allegedly had been obtained as the result of an unreasonable search. The petitioners point out that recent decisions of the Supreme Court of the United States have applied the provisions of the Fourth Amendment to the Constitution of the United States condemning unreasonable searches to the conduct of state judicial proceedings. Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed 2d 1081. Petitioners further contend that inasmuch as Mapp v. Ohio, supra, was announced subsequent to their conviction they should now have the benefit of the rule of that decision in this habeas corpus proceeding.

It should be noted in passing that Mapp v. Ohio, supra, was a direct attack on a judgment of the Ohio court by way of an appeal taken to the Supreme Court of the United States. It was not a collateral post – conviction assault on the state court judgment.

The basic weakness in the position of the petitioners, however, is the fact that the decision in Mapp v. Ohio, supra, added nothing whatever to the law of Florida. It created no new procedural right so far as the jurisprudence of this State is concerned. This Court long ago concluded that evidence obtained as the product of an unreasonable search is not admissible in a criminal proceeding. Florida has long recognized the so-called "exclusionary rule" regarding the inadmissability of such evidence. Thurman v. State, 116 Fla. 426, 156 So. 484; Jackson v. State, 87 Fla. 262, 99 So. 548; Chacon v. State, Fla., 102 So. 2d 578. While this Court has consistently excluded such evidence under Section 22 of the Declaration of Rights, Florida Constitution, it has with equal consistency noted the similarity between the provisions of the Florida Constitution and the provisions of the Fourth Amendment to the Constitution of the United States. Thurman v. State, supra; Jackson v. State, supra; see also F. S. 933.19. By virtue of this interpretation of the Florida Constitution and the recognized similarity between the state and federal constitutions regarding unreasonable searches, it is clear that the rule of Mapp v. Ohio, supra, created no new right in favor of those being tried for crimes in this state.

It should be recalled that we are now considering a post-conviction habeas corpus proceeding. It is well established that habeas corpus may not be substituted for a direct review by appeal. Where one has exercised his right of appeal he may not thereafter resort to habeas corpus to obtain a review of

questions which were presented or which might have been raised in the course of his appeal. Collingsworth v. Mayo, Fla. 1948, 37 So. 2d 696; State v. Culbreath, 147 Fla. 560, 3 So. 2d 380; Washington v. Mayo, Fla. 1953, 77 So. 2d 620.

The claimed right which the petitioners now assert was available to them throughout the entire proceeding. It was the type of procedural protection which they were entitled to assert at the trial level, in the District Court and on up to the Supreme Court of the United States if they had desired to do so. It is not the type of procedural right which can be asserted by them in an independant post-conviction habeas corpus proceeding.

The writ of habeas corpus is denied.

It is so ordered.

ROBERTS, C. J., DREW, O'CONNELL and CALDWELL, JJ., concur

APPENDIX 2-A

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962
MONDAY, JANUARY 7, A. D. 1963

JOHN SING and FRIEDA SING,

Petitioners

—vs—

LOUIE L. WAINWRIGHT, AS DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA,

Respondent

CASE NO. 32,031

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy
TEST:

Guyte P. McCord
Clerk Supreme Court.

(SEAL)

APPENDIX 3-A

IN THE SUPREME COURT OF FLORIDA

JOHN SING and FRIEDA SING,

Petitioners,

vs.

LOUIE L. WAINWRIGHT, as Director, Division of Corrections, State of Florida,

Respondent.

CASE NO. 32,031

Comes now the Petitioners, John Sing and Frieda Sing, jointly and severally, and respectfully petition this Court to grant a re-hearing herein and re-consideration of that certain Order bearing date of November 14, 1962, for the reason the Court overlooked and failed to consider the following:

(1) The State of Florida failed to file any pleading directed to said Petition denying or otherwise challenging or testing the sufficiency of the Petition and the matters of fact set forth therein stands before this Court as true and undenied and by reason thereof the Petitions are entitled to be heard in a formal hearing on the allegations of said Petition.

(2) The Court failed to apply the decisions and rules of the United States Courts with respect to and testing the

validity and legality of the use of the evidence by the State of Florida as referred to in the Petition.

Respectfully submitted,

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Lake City, Florida

Attorneys for Petitioners

By: /S/ A. K. BLACK
Of counsel

I hereby certify that a copy hereof has been furnished by United States Mail to Honorable Richard W. Ervin, Attorney General, Tallahassee, Florida, this November 27, 1962.

/S/ A. K. BLACK